The Unalienable Right of Property: Its Foundation, Erosion and Restoration*

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I. INTRODUCTION

The purpose of this examination of the foundation of property law in America is similar to the purpose of the Declaration of Independence. "Not to find out new principles, or new arguments, never before thought of, not merely to say things which had never been said before; but to place before mankind the common sense of the subject . . . ."[1]

The "common sense of the subject" expressed in the Declaration of Independence was that a national civil government must be based upon the "Laws of Nature and of Nature's God." The laws of nature and of nature's God dictate that all men are equally endowed by their Creator with unalienable rights to "Life, Liberty and the pursuit of Happiness." In Jefferson's day, the common sense of the subject was that the pursuit of happiness included the unalienable right of the individual to acquire, possess, protect and dispose of property. Because the purpose of civil governments was to secure unalienable rights, violations of one's unalienable right of property were subject to civil sanction.

Today, however, the common sense of the subject is quite the opposite. The modern idea is that civil government properly possesses all power over all subjects of property. Any rights that may exist are derived from the civil government. Any rights to property that a person has may be regulated, limited or revoked by the civil government in order to satisfy the "public interest." Some have advocated that there are no such things as rights, but merely social duties.

There is a clear distinction between the common sense in Jefferson's day and current thinking about property rights. This has resulted from a failure to remain faithful to the laws of nature and of nature's God. Scholars have adopted alternative theories of property premised upon power and expediency. They have supported such theories by inaccurate interpretations of feudal history. They have failed to recognize the fact that colonial America rejected European feudalism. When such ideas infiltrated the political arena, the progressive movement was able to extend the power of American civil government and its control over private property.

The rejection of the laws of nature and of nature's God has led to expanded civil power and the violation of unalienable rights. Once the unalienable right of property is violated, life and liberty are no longer secure. The challenge facing America is to end the violation of not only property rights but also unalienable rights in general. The only way such a challenge can be won is to return to the Declaration of Independence, the laws of nature and of nature's God, and unalienable rights.

II. THE DECLARATION OF INDEPENDENCE AFFIRMS UNALIENABLE PROPERTY RIGHTS

In 1776 representatives of the thirteen United Colonies gathered to declare their independence from a tyrannical English government. They fashioned an unimpeachable legal basis for their claim to

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1. Letter from Thomas Jefferson to Henry Lee (May 8, 1825), *reprinted in* 16 The Writings of Thomas Jefferson 117, 118 (A. Lipscomb ed. 1905) [hereinafter Writings].

liberty. The Declaration of Independence stated the fundamental principles upon which civil governments should be established. Understanding the Declaration is crucial to a proper assessment of the principles of law in the United States.

> If the declaration of independence is not obligatory, our intire political fabrick has lost its magna charta, and is without any solid foundation. But if it is the basis of our form of government, it is the true expositor of the principles and terms we have adopted.[2]

Grasping these principles is also essential to a correct comprehension of the foundation of property law in the United States. The whole Declaration is premised upon the "Laws of Nature and of Nature's God." An examination of the foundation of property rights is meaningless apart from this language.

A. The Laws of Nature and of Nature's God

Reliance upon the laws of nature and of nature's God was not a new position created as an expedient measure to justify independence from Great Britain. Thomas Jefferson verified this by his statement that the intent was "[n]ot to find out new principles, or new arguments, never before thought of."[3] Rather, the Framers were relying upon a centuries' old premise of law.

Sir Edward Coke addressed the subject of the law of nature as early as the seventeenth century.

> The law of nature is that which God at the time of creation of the nature of man infused into his heart, for his preservation and direction; and this is *lex aeterna*, the moral law, called also the law of nature. . . . This law of nature, which indeed is the eternal law of the Creator, infused into the heart of the creature at the time of his creation, was two thousand years before any laws written, and before any judicial or municipal laws.[4]

Blackstone in the eighteenth century provided an exposition of the laws of nature and of nature's God as that phrase was historically understood. Blackstone began with the common definition of law as "a rule of action . . . which is prescribed by some superior, and which the inferior is bound to obey."[5] From this he made it clear that "[m]an, considered as a creature, must necessarily be subject to the laws of his creator, for he is entirely a dependent being."[6] Blackstone concluded that because "man depends absolutely upon his maker for every thing, it is necessary that he should in

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2. J. Taylor, New Views of the Constitution of the United States 2 (Washington 1823 & photo. reprint 1971).

3. Writings, *supra* note 1.

4. Calvin's Case, 77 Eng. Rep. 377, 392 (1609).

5. 1 W. Blackstone, Commentaries *38.

6. *Id.* at 39.

all points conform to his maker's will."[7] This argument was crucial because the "will of his maker is called the law of nature."[8]

> This law of nature, being coeval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.[9]

Blackstone affirmed that the Creator endowed man with the faculty of reason so that he could recognize the purpose of these laws. Regrettably, man's reason is no longer, "as in our first ancestor before his transgression, clear and perfect, unruffled by passions, unclouded by prejudice, unimpaired by disease or intemperance."[10] Rather, every person now finds that his ability to reason and understand is full of error.

Man's faulty intellect has been aided by direct revelation. 'The doctrines thus delivered we call the revealed or divine law, and they are to be found only in the holy scriptures."[11] Blackstone explained that the revealed precepts were recognizable as a part of the original law of nature. As a result, he concluded that "[u]pon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these."[12] Blackstone referred to the law of revelation as the "law of God." Thus, we have the law of nature and the law of God.

Blackstone used the two separate phrases, the "law of nature" and the "law of God," because they referred to different expressions of God's revelation. The "law of nature" referred to God's eternal law revealed in Creation. The "law of God" referred to the law revealed in Scripture.

Jefferson's construction of the phrase "Laws of Nature and of Nature's God" evidenced reliance upon the same symmetry used by Blackstone. Jefferson was careful to use the distributive plural "laws." This word choice served to distinguish the law of nature and the law of God who is over nature. As well, the distributive plural served to link the two phrases as signifying the same thing.[13]

Jefferson obviously was not formulating some new philosophy. His phraseology carried a commonly understood meaning. "It was not Jefferson's task to create a new system of politics or

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7. *Id.*
8. *Id.*
9. *Id.* at 41.
10. *Id.*
11. *Id.* at 42.
12. *Id.*
13. Gary T. Amos, Biblical Principles of Government 270 (1987) (unpublished manuscript).

government but rather to apply accepted principles to the situation at hand."[14] Jefferson phrased the Declaration to indicate that all men were created with certain inherent rights premised upon the laws of nature and of nature's God.

The colonists had to appeal to the laws of nature and of nature's God because the British Parliament declared the colonists to be outside the British constitution and denied the colonists the protection of the laws. British execution of law was no longer consistent with the laws of nature and of nature's God and therefore did not warrant obedience. Once inconsistent with the laws of nature and of nature's God, British execution of law also proved violative of human rights. Therefore, in order to protect their rights, the colonists had to appeal to unalienable rights. The rights of Englishmen were apparently contingent upon the good graces of the Crown and were too country specific.

The laws of nature and of nature's God are the foundation for unalienable rights. The word "unalienable" may be defined as that which is not alienable nor transferable.[15] Therefore, that which is unalienable may not be sold or transferred to another. By this, it is apparent that unalienable rights speak of rights which no man may sell, trade or transfer. As well, if a man may not freely transfer such a right by his own choice, certainly he may not be compelled to do so by some other person or power.

To better understand the text of the Declaration, we must also comprehend the nature of "rights." A simplistic definition would be that a right is a just claim.[16] However, a more complete definition indicates that a right is a just claim based upon conformity to the perfect standard of truth and justice; that perfect standard is found only in the infinite God and His will or law.[17] This definition evidences the relation of rights to the laws of nature and of nature's God.

The two above definitions are consistent with a contextual examination of the Declaration of Independence. The statement that all men are "endowed by their Creator with certain unalienable Rights" affirmed rights as just claims based in God's will. Men have certain rights which they may not be denied because the Creator fashioned man's nature in such a way that denial of those rights denies man's humanity. The nature of man and the nature of rights inherent within man was not left to subjective manipulation. The Declaration of Independence relied upon the laws of nature and of nature's God as the only objective standard.

Unalienable rights may be properly alienated only as a result of forfeiture for the commission of a wrongful act. Forfeiture occurs when subsequent to an individual's commission of a civil wrong for which he is found liable by due process, or by commission of a criminal act for which he is

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14. Sources of Our Liberties 318 (R. Perry ed. 1978) [hereinafter Sources].

15. Black's Law Dictionary 1366 (5th ed. 1979).

16. 2 S. Johnson, A Dictionary of the English Language, s.v. "right" (London 1755).

17. 2 N. Webster, An American Dictionary of the English Language, s.v. "right" (New York 1828 & photo. reprint 1980) (reprinted in one volume).

procedurally determined guilty, he is deprived of life, liberty or property in accordance with justice. Such deprivations do not involve the alienation of an unalienable right because any just claim to life, liberty or property was forfeited when the wrongful act was committed.[18]

The Declaration of Independence was an effort by the colonists to declare their ultimate reliance upon the laws of nature and of nature's God. Their appeal to an absolute and objective standard was an effort to secure the unalienable rights of the colonists. They recognized that they had a just claim to the unalienable right to life. The same held true for liberty. They also declared a just claim to the unalienable right to the "pursuit of Happiness." This phrase must be examined in order to understand the foundation of property law in the United States.

B. The Meaning of the "Pursuit of Happiness"

The Declaration of Independence affirms that people are endowed with unalienable rights, including "Life, Liberty and the pursuit of Happiness." The language is distinguishable from the "life, liberty and property" wording usually attributed to John Locke. An examination of appropriate documents reveals a deliberate purpose for the specific wording of the Declaration. The intent was to select language which would not be considered redundant because the Lockean use of the word property included liberty. Also, the intent was to avoid standardizing eighteenth-century practices or concepts of property law, such as slavery. The intent was to select language which referred to a person's general rights which include property, contract and other economic liberties consistent with the eternal laws of justice found in the laws of nature and of nature's God.

The Magna Carta of 1215 served to influence American constitutional liberties.[19] This document was the result of protests against the use of governmental power for tyrannical purposes. It affirmed that the rule of law limits the authority of men exercising governmental power. From this premise, the Magna Carta affirmed the principle that life, liberty and property must be protected. Sir Edward Coke supported this interpretation in his treatise concerning that document.[20]

The First Virginia Charter of 1606 stated that rights enjoyed by Englishmen, principally those of the Magna Carta, would be enjoyed by settlers of the new colonies in North America.[21] This same general guarantee is found in the Charter of New England of 1620,[22] the Charter of Massachusetts

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18. Christians for Justice International, A Declaration of Universal Rights 2 (1988).

19. The Magna Carta (1215), *reprinted in* Sources, *supra* note 14, at 11.

20. *See generally* E. Coke, The Second Part of the Institutes of the Laws of England (London 1797 & photo. reprint 1986).

21. 7 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws 3788 (F. Thorpe ed. 1909 & photo. reprint 1977) [hereinafter Thorpe].

22. 3 *id.* at 1839.

Bay of 1629,[23] the Charter of Maryland of 1632,[24] the Charter of Maine of 1639,[25] the Charter of Connecticut of 1662,[26] the Charter of Rhode Island of 1663,[27] and the Charter of Carolina of 1663.[28] So the colonies were initiated upon the principle that the rule of law protected inherent rights of life, liberty and property.

The Bill of Rights of 1689 was another major British document affirming fundamental rights and liberties of Englishmen.[29] This document fostered further protections of life, liberty and property. The document obliged the British government to secure these rights of the colonists because they too were Englishmen. However, as noted previously, the rights of Englishmen were eventually violated by Parliament and the Crown.

John Locke published his *Two Treatises of Government* within a few years of the enactment of the Bill of Rights. *The Second Treatise* is the primary source for Locke's arguments concerning life, liberty and property. He used several variations of the phrase: "Life, Health, Liberty, or Possessions";[30] "Life, Liberty, Health, Limb or Goods";[31] "Estate, Liberty, Limbs and Life";[32] "Lives, Liberties and Estates";[33] "Lives, Liberties, and Possessions";[34] and "Lives, Liberties, or Fortunes."[35] Locke did not use the phrase "life, liberty and property" in his second treatise. To do so would have been redundant. Locke repeatedly pointed out that by using the word property, he meant "that Property which Men have in their Persons as well as Goods."[36] He used "the general Name, *Property*" to refer to "Lives, Liberties and Estates."[37] Using the phrase "pursuit of Happiness," the Declaration of Independence avoided the redundancy which occurred if the Lockean use of the word property was related to liberty.

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23. *Id.* at 1857.
24. *Id.* at 1681.
25. *Id.* at 1635.
26. 1 *id.* at 533.
27. 6 *id.* at 3220.
28. 5 *id.* at 2747.
29. Bill of Rights (1689), *reprinted in* Sources, *supra* note 14, at 245.
30. J. Locke, Two Treatises of Government 311 (P. Laslett rev. ed. 1963).
31. *Id.*
32. *Id.* at 356.
33. *Id.* at 395.
34. *Id.* at 429.
35. *Id.* at 460.
36. *Id.* at 430.
37. *Id.* at 395.

Further insight into the "pursuit of Happiness" is available from Blackstone. Blackstone discussed the fundamental rights of Englishmen in light of the Magna Carta. The declaration of rights and liberties in the Magna Carta conformed to the natural liberties of all individuals.[38] The natural liberties inherent within the individual were endowed by God at the person's creation.[39] Blackstone indicated that these rights were reducible to three primary articles: the right of personal security, the right of personal liberty and the right of private property.[40]

Blackstone indicated that the inherent right of personal security included the person's "enjoyment of his life, his limbs, his body, his health, and his reputation."[41] This list may be summarized in the word "life." Life is a gift from God and is therefore an inherent right.[42]

Blackstone addressed the subject of personal liberty as a God-given, inherent right. Blackstone argued that it consisted of the liberty to move about, at will, from place to place without fear of restraint or imprisonment without due process.[43]

According to Blackstone a third inherent right was the God-given gift of private property. The right "consists in the free use, enjoyment, and disposal of all [personal] acquisitions."[44] He also spoke of the "sacred and inviolable rights of private property."[45]

Blackstone's three-part expression was translated into the American legal tradition by the Declaration and Resolves of the First Continental Congress. The document affirmed the position that "the inhabitants of the English colonies in North-America, by the immutable laws of nature, the principles of the English constitution, and the several charters or compacts" were "entitled to life, liberty and property."[46] This language indicated reliance upon both the Magna Carta and the immutable laws of nature because the Magna Carta was a voidable act of man, while the laws of nature were permanent. The language indicated that the draftsmen did not rely upon the Lockean view of property as simply another way of saying life, liberty and estate. Rather, they relied upon Blackstone's three-part division of God-given, inherent rights.

The meaning of the "pursuit of Happiness" is further revealed by the Bill of Rights to the

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38. 1 W. Blackstone, Commentaries *127-29.

39. *Id.* at 125.

40. *Id.* at 129.

41. *Id.*

42. *Id.*

43. *Id.* at 134.

44. *Id.* at 138.

45. *Id.* at 140.

46. Declaration and Resolves of the First Continental Congress (1774), *reprinted in* Sources, *supra* note 14, at 287.

Constitution of Virginia. Adopted June 12, 1776, roughly one month prior to the Declaration of Independence, a key provision states:

> That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.[47]

This language reflected Blackstone's three-part expression of inherent rights. Life, liberty and property were recognized as inherent rights of the individual and not originating with civil society. The property aspect was expanded to reflect just what sort of property rights were inherent. Apparently, the means of acquiring and possessing property generally were inherent rights. This does not imply that people have an inherent right to any specific item or amount of property. The language indicated that the means of pursuing and obtaining happiness were equally inherent rights. This may include such economic rights as contract and profession.

The language of the Virginia Bill of Rights was similar to that of the Declaration. The Declaration, however, relied upon the "pursuit of Happiness" rather than property. This word choice served the purpose of avoiding the Lockean redundancy and of encompassing in few words, more than rights in property. To understand the context of the phrase, recourse must again be made to Blackstone's *Commentaries*.

Blackstone indicated that the Creator "has been pleased so to contrive the constitution and frame of humanity, that we should want no other prompter to inquire after and pursue the rule of right, but only our own self-love, that universal principle of action."[48] Blackstone clarified this by pointing out that the Creator

> has so intimately connected, so inseparably interwoven the laws of eternal justice with the happiness of each individual, that the latter cannot be attained but by observing the former; and, if the former be punctually obeyed, it cannot but induce the latter. In consequence of which mutual connection of justice and human felicity, he has not perplexed the law of nature with a multitude of abstracted rules and precepts, referring merely to the fitness or unfitness of things . . .; but has graciously reduced the rule of obedience to this one paternal precept, "that man should pursue his own true and substantial happiness."[49]

An unalienable right to the "pursuit of Happiness" meant simply that every individual was created with the inherent right to live in accordance with the laws of eternal justice. The phrase also avoided redundancy by the use of the word "property." It allowed recognition of more rights than that of

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47. 7 Thorpe, *supra* note 21, at 3813.

48. 1 W. Blackstone, Commentaries *40.

49. *Id.* at 40-41.

property or the legal procedures for dealing with property. It also allowed for use of Blackstone's own pretext test to determine whether property right "tends to man's real happiness, and therefore justly concluding that . . . it is a part of the law of nature."[50] It may be concluded that the denial of property rights is "destructive of man's real happiness, and therefore that the law of nature forbids it."[51]

The above interpretation of the "pursuit of Happiness" phrase was adopted by individual states. State constitutions drafted after the Declaration of Independence indicated a common understanding.

The Constitution of Pennsylvania of August 16, 1776, affirmed:

> That all men are born equally free and independent, and have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.[52]

The Delaware Declaration of Rights of September 11, 1776, indicated "[t]hat every member of society hath a right to be protected in the enjoyment of life, liberty and property."[53] Delaware chose to use Blackstone's brief three-part expression of inherent rights.

The Constitution of Vermont of July 8, 1777, affirmed:

> That all men are born equally free and independent, and have certain natural, inherent and unalienable rights, amongst which are the enjoying and defending life and liberty: acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.[54]

The Constitution of Massachusetts of October 25, 1780, recognized:

> All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.[55]

A Justice of the United States Supreme Court, D. J. Brewer, referred to the Constitution of

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50. *Id.* at 41.

51. *Id.*

52. 5 Thorpe, *supra* note 21, at 3082.

53. Delaware Declaration of Rights (1776), *reprinted in* Sources, *supra* note 14, at 338.

54. 6 Thorpe, *supra* note 21, at 3739.

55. 3 *id.* at 1889.

Massachusetts for his argument to protect private property.[56] He informed Yale graduates:

> Its last clauses simply define what is embraced in the phrase, - "the pursuit of happiness." They equally affirm that sacredness of life, of liberty, and of property, are rights, - unalienable rights; anteceding human government, and its only sure foundation; given not by man to man, but granted by the Almighty to every one: something which he has by virtue of his manhood, which he may not surrender, and of which he cannot be deprived.[57]

The Constitution of New Hampshire of June 2, 1784, affirmed:

> All men have certain natural, essential, and inherent rights; among which are - the enjoying and defending life and liberty - acquiring, possessing and protecting property - and in a word, of seeking and obtaining happiness.[58]

As the constitutions of Massachusetts and New Hampshire indicated, seeking and obtaining happiness was used as a shorthand reference to a host of unalienable rights, including property. The Framers paralleled the inherent right of property with the unalienable right to the pursuit of happiness. The "pursuit of Happiness" phrase of the Declaration referred to the right to use just means of acquiring, possessing, and protecting property, and seeking, pursuing and obtaining happiness, but by using more abbreviated language. Judge Brewer affirmed this definition of the phrase:

> When among the affirmations of the Declaration of Independence, it is asserted that the pursuit of happiness is one of the unalienable rights, it is meant that the acquisition, possession, and enjoyment of property are matters which human government cannot forbid, and which it cannot destroy . . . .[59]

Clearly, the "pursuit of Happiness" phrase carried a very specific meaning. Part of the problem involved when addressing the unalienability of property rights is that, historically, the specific meaning has not been carefully maintained or clearly articulated. In a certain, carefully defined context, property rights are alienable. In a more general sense, property rights are unalienable.

Obviously, property of various descriptions is bought and sold daily. When a person sells a piece of property, be it a house, a piece of land or a car, he is transferring his right to that item of property. He is alienating his property right to that item. He is alienating his right to that particular subject

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56. D. Brewer, Protection to Private Property from Public Attack, An address delivered before the graduating class at the sixty-seventh anniversary of Yale Law School on June 23, 1891 (The Microbook Library of American Civilization 40071).

57. *Id.* at 4.

58. 4 Thorpe, *supra* note 21, at 2453-54.

59. D. Brewer, *supra* note 56, at 5.

of property. He is not, however, alienating his right to own property.

Because of the ability to alienate one's right to a particular subject of property, some writers have concluded that one's general right to property is necessarily an alienable right.[60] The misunderstanding is due to a failure to distinguish between the right to freely transfer or alienate particular items by use of the procedural means provided in law, and the inability to transfer the general right to acquire, possess or dispose of property. The unalienable right of property refers to that general right to acquire, possess or transfer property. That right cannot be denied without denying an inherent right that is indicative of one's humanity. The general right to acquire, possess or transfer property is an unalienable right, derivative of the laws of nature and of nature's God, and encompassed in the phrase the "pursuit of Happiness."

Unalienable rights are general rights understood only in light of the laws of nature and of nature's God. A person has an unalienable right to life in general. He does not have an unalienable right to a specific quality of life, or quantity of life. Likewise, a person has an unalienable right to liberty in general. He does not have an unalienable right to unlimited liberty without responsibility. Similarly, the unalienable right to the pursuit of happiness is a general statement. A person does not have an unalienable right to a particular degree of happiness, or particular kind of happiness. An unalienable right to property also must be understood in a general sense. A person does not have an unalienable right to a particular piece of property, or amount of property. The unalienable right of property refers to the general right to use means consistent with the laws of nature and of nature's God in order to acquire, possess or transfer property. That right cannot be denied without denying an inherent aspect of a person's humanity. The same is true of all unalienable rights.

According to the Declaration of Independence, the United States is established upon principles derived from the laws of nature and of nature's God. Therefore, the civil government of the United States is obligated to secure the unalienable rights of the individual. The unalienable right to the pursuit of happiness includes the general right to property. This foundation must be embraced in order to secure property rights. To do this, it is necessary to demonstrate that although modern theorists have assumed that American property law is premised upon ancient feudalism, Americans consciously rejected feudalistic practices.

C. The Break from Feudal Notions of Property

The foundation for law in the United States is the law of nature and of nature's God. This objective standard differs from a system based upon feudalistic concepts. This standard facilitated rejection of the feudalistic principle that all property was subject to ultimate title in the civil ruler. Such

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60. Story, Natural Law, *in* 9 Encyclopedia Americana 150,151 (F. Lieber new ed. 1836), *reprinted in* 7 J. Christian Jurisprudence 31 (1988). Story wrote many articles on private law for Lieber's Encyclopedia. These articles, though written on the behest of Lieber, are unsigned, as Story requested. *See* 1 F. Lieber, Civil Liberty and Self-Government 232, at nn. 3, 14 (1883). *See also* Letter from Joseph Story to Edward Everett (Nov. 1, 1832) (Story Papers, Massachusetts Historical Society).

feudal subordination threatened unalienable rights.

Historically, feudal institutions were implemented in Europe to meet the need for an effective military force to stabilize power in the state. The system provided strict military and political cooperation. Individuals were commonly supported by a grant of land in return for obedient service, thereby becoming vassals dependent upon the lord.[61]

Feudalism originated with the military practice of the nations that migrated into the regions of Europe at the decline of the Roman Empire.[62] The ultimate proprietor of property held the source of political power.[63] A proper military subjection was introduced. "Military ideas predominated; military subordination was established; and the possession of land was the pay which the soldiers received for their personal services."[64] But because the chief represented the society, the ultimate property of the soil and the source of power vested in him.[65]

The feudal relationship was primarily defensive.[66] The military tenure was to maintain the power of the Crown by protecting against rebellion from within and invasion from without.[67]

The institution of the Domesday Book formalized the subordination of feudal estates.[68] By consenting to the introduction of feudal concepts, the English meant no more than to establish a defensive military system.[69] The system was firmly rooted in English common law by the thirteenth century.

A fundamental maxim of English tenures, though Blackstone called it a mere fiction, was

> "that the king is the universal lord and original proprietor of all the lands in his kingdom; and that no man doth or can possess any part of it, but what has mediately or immediately been derived as a gift from him, to be held upon feodal services."[70]

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61. S. Painter, Feudalism and Liberty 3-7 (1961).

62. 2 W. Blackstone, Commentaries *45.

63. Watkins, *Introduction* to G. Gilbert, The Law of Tenures vi (London 5th ed. 1824).

64. *Id.* at viii (quoting Robertson, I Hist. of Scotl. 16 c. 1).

65. *Id.* at ix.

66. 3 J. Kent, Commentaries *492.

67. C. Moynihan, Introduction to the Law of Real Property 3-4 (2d ed. 1988).

68. 2 W. Blackstone, Commentaries *49. In 1086 William the Conqueror instituted a comprehensive and detailed survey of English lands. This resulted in a statistical record of the feudal tenures embodied in two volumes commonly known as the Domesday Book C. Moynihan, *supra* note 67, at 6-7.

69. *Id.* at 51.

70. *Id.*

Blackstone considered such a doctrine of subordination contrary to English understanding and intent.

The Norman lawyers, skilled in the feudal constitutions, and understanding the import and extent of the feudal terms, introduced rigorous doctrines and services as if the English owed everything they had to the bounty of their sovereign king.[71] The principle of military organization was coupled with the notion that all lands were originally granted out by the sovereign. The grantor forcefully retained the dominion or ultimate property of the land while the grantee had only the use and possession. In this manner, the feudal system came to be considered a civil establishment, rather than only a military plan. As a result of subordination to the king, oppressive consequences were instituted hindering the civilization and improvement of the people.[72]

Kent affirmed that the feudal system degenerated and, except in England, "annihilated the popular liberties of every nation in which it prevailed."[73] Kent indicated that "the great effort of modern times" should be "to check or subdue its claims, and recover the free enjoyment and independence of allodial estates."[74]

Under the feudal system, the absolute power of the king included the only true ownership right to property of any sort. The concept of holding the right to use by grant of right from the king was a part of the English common law. At best one might argue that American property law was premised upon the common law and the inherent feudal traditions. However, America rejected the feudal concept of subordination because it threatened unalienable rights. By custom and by statute Americans sought to establish a legal tradition distinguishable from the English common law. The legal terminology of feudal law continued for convenience, but the oppressive practice of feudal subordination was rejected.

Powell has noted the American independence from the common law of England. The early colonial charters included a power to legislate so long as the laws were not repugnant to the laws of England. The mere absence of repugnance allowed freedom for substantial change. Being free from the impositions of the laws of England, the colonists began to regulate their affairs by a generally popular sense of right derived from the Scriptures. Some aspects of the English common law were found helpful and were eventually legislated; others were rejected. The theory was one of selective incorporation of certain common law principles.[75]

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71. *Id.*

72. *Id.* at 53-58.

73. 3 J. Kent, Commentaries *501.

74. *Id.* The term "allodial" simply meant land held in absolute ownership, not in dependence upon any other body or person in whom the proprietary rights were supposed to reside, or to whom the possessor of the land was bound to render service.

75. 1 R. Powell, The Law of Real Property 97-106 (1988).

Jesse Root also affirmed liberation from the English common law. While the colonists were knowledgeable of that common law, they were free from total subjection to it. This freedom allowed the Americans to reject many of the feudal practices inherent in the English system. The Americans fostered increased property rights, because they recognized that all rights were derived from the law of nature and of revelation. As a result, their title to land was not subject to the king.[76]

Current property law asserts that if feudal property law was a part of English common law, and if the colonies in America were subject to English common law, then America would also be subject to feudal property law. The arguments of Root and Powell, however, affirm the American independence from the English version of the common law and the rejection of feudal subordination. Other writers give further evidence for the American independence from feudal subordination.

Washburn said that "Great Britain relinquished all claim . . . to the proprietary and territorial rights of the United States: and these rights vested in the several States . . . ."[77] The states consisted of landowners acting as a corporate body to secure individual rights. New York New Jersey, South Carolina and Michigan expressly denied the existence of feudal subordination. In 1793 Connecticut "declared every proprietor in fee-simple of land to have an absolute and direct dominion and propriety in it."[78] In 1779 Virginia statutorily abolished feudal subordination practices. Pennsylvania, Maryland and Wisconsin declared their land allodial.

Joseph Story indicated that

> [i]n all the colonies the lands within their limits were by the very terms of their original grants and charters to be holden of the crown in free and common socage . . . . All the slavish and military part of the ancient feudal tenures was thus effectually prevented from taking root in the American soil; and the colonists escaped from the oppressive burdens [of subordination] . . . . In short, for most purposes, [American] lands may be deemed to be perfectly allodial, or held of no superior at all . . . .[79]

Kent affirmed that the states were never marked by subordination. In all the states, the "ownership of land [was] essentially free and independent."[80] The New York legislature abolished any notion of the existence of subordination and declared all lands within the state to be allodial. The entire and absolute property vested in the owner. The title to land was essentially allodial, and every

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76. J. Root, The Origin of Government and Laws in Connecticut, 1798, *reprinted in* The Legal Mind in America 31-40 (P. Miller ed. 1962). Perry Miller also indicates that James Kent and David Hoffman defended an American legal tradition divested of the peculiarities of the English common law and premised instead upon the laws of nature. *Id.* at 93-94. *See also* D. Hoffman, A Course of Legal Study (Philadelphia 2d ed 1846 & photo. reprint 1968).

77. 1 E. Washburn, A Treatise on the American Law of Real Property 68-69 (5th ed. 1887).

78. *Id.* at 69.

79. 1 J. Story, Commentaries on the Constitution of the United States 125 (5th ed. 1905).

80. 3 J. Kent, Commentaries *488.

tenant in fee simple had an absolute and perfect title, even though the technical language called his estate fee simple and the tenure free and common socage. This technical language was "interwoven with the municipal jurisprudence" of the states, while all vestiges of feudal subordination were rejected.[81]

Writing in 1896, Earl Hopkins gave a brief history of feudalism in Europe. He pointed out that "[t]he feudal system never took root in the United States."[82] An estate would have been "by free and common socage, and not subject to the burdensome incidents of subordination of tenure . . . . Lands [were] allodial; that is, held in absolute ownership . . . ."[83]

Minor and Wurtz indicated that

> [t]he only feudal tenure ever recognized in this country was that of free and common socage, . . . the tenure upon which all the grants of colonial land by the crown were based . . . . [A]t the time these grants were made, the socage tenure had already been stripped of all its burdensome incidents, so that they never existed here.[84]

After the War for Independence, even the "subservience to sovereignty evidenced by the socage tenure" was abolished.[85] In essence, feudal subordination was abolished entirely. An American's authority over property must be free from any obligation to superior title in the state.

Hopkins did point out that the documentary title evidencing ownership of the land was originally derived from the state. This was merely a legal convention evidencing title so that the state could help secure the person's property right. Until the patent was issued, the legal title remained in the United States as trustee. The equitable title was in the holder of the certificate of entry which was issued by the register of the land office and entitled the claimant to the patent.[86]

Washburn also addressed the patent process.

> [W]hile in equity a purchaser acquires a good title to land which he may have entered and actually paid for, and for which he holds the certificate from the proper officer, in order to prevail in a court of law he must have had a title by patent . . . . [A]fter the purchase from the United States, the purchaser acquires all the property which the United States had in the land; that the equitable and legal title passes from the United States, which only retains the

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81. *Id.*

82. E. Hopkins, Handbook on the Law of Real Property 31 (1896).

83. *Id.*

84. R. Minor & J. Wurtz, The Law of Real Property 12 (1910).

85. *Id.*

86. E. Hopkins, *supra* note 82, at 403.

> formal technical legal title in trust for the purchaser until the patent issues . . . . "Lands which have been sold by the United States can, in no sense, be called the property of the United States . . . . When sold, the government, until the patent shall issue, holds the mere legal title for the land in trust for the purchaser . . . ."
>
> . . . "The patent [was] conclusive evidence . . . of the relinquishment to the patentee of all interest the United States held, as trustee, in the land."[87]

Feudalism never existed in the United States. Some of the feudal language was used because it was familiar, but the burdens of feudalism were rejected. References to socage tenure denoted land held by a fixed service, which is not military, nor in the power of the lord to vary.

> Socage tenures do not exist any longer . . . . An estate in fee-simple means an estate of inheritance, and . . . it has lost entirely its original meaning as a beneficiary . . . estate . . . . Whether a person holds his land in pure *allodium*, or has an absolute estate of inheritance in fee-simple, . . . his title is the same . . . .[88]

Escheat was another of those incidents which has lost its feudal character.

> [E]scheat of lands was regarded as merely falling back into the common ownership of the State . . . because the tenant did not see fit to dispose of them in his lifetime, and left no one who . . . has any claim to inherit them . . . . Land being allodial in the United States, escheat properly speaking did not apply to it, but in case of failure of heirs . . . .[89]

The principle was that if land escheats to the state, it was held in trust for the citizens until a bona fide purchaser seeks a patent.

Washburn indicates that some aspects of

> our law of real estate, including the forms of conveyance, as well as the terms in use in applying them, were borrowed originally from the feudal system . . . . [However,] the adoption of expressions or forms of process borrowed from a once existing system of laws, does not necessarily imply that that system has not become obsolete.[90]

States frequently passed statutes to emphasize the fact that the feudal practice of subordinating all property right to the civil authority was rejected.

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87. 3 E. Washburn, *supra* note 77, at 208-10.

88. 3 J. Kent, Commentaries *514.

89. 3 E. Washburn, *supra* note 77, at 52-53.

90. 1 *id.* at 71.

Thus, the colonists made a conscious and absolute break from the systems which they knew to be a threat to the unalienable right of property. While it is true that they used the technical legal language of the feudal and common law tradition, this was done for convenience. To have fostered feudal subordination would have undermined the effort to affirm the unalienable rights of the individual as dictated by the laws of nature and of nature's God. The continued use of feudal terminology in deeds and titles would be used eventually to argue that America was established upon feudal principles and to deny any just claim to unalienable property rights.

The Declaration of Independence affirmed unalienable property rights. The history of the phrase "Laws of Nature and of Nature's God," the foundation of the Declaration of Independence, evidences the validity of unalienable rights and the necessity to secure them. The history of the phrase "pursuit of Happiness" evidences that it included unalienable property rights. American legal writers recognized that the laws of nature and of nature's God and the pursuit of happiness supported the rejection of the European feudalistic practice of subordination. The next section evidences that the challenge to secure unalienable property rights has been brought about by a failure to adhere to the Declaration of Independence in favor of European theories of property.

III. THE GRADUAL DEMISE OF THE UNALIENABLE RIGHT OF PROPERTY

Historically, the established foundation of unalienable property rights has not been articulated carefully or defended consistently. Therefore, a gradual demise of property rights has occurred since the latter portion of the eighteenth century. The first stage was the early nineteenth-century failure to resolve the question of the origin and nature of property rights. During the second stage, advocates of state power and efficiency resurrected feudalistic principles and fostered them through legal education. The third stage saw developments in the political arena consisting of progressive expansion of state control over property.

A. The Nineteenth-Century Debate

A debate has continued for centuries concerning the origin and nature of property rights. Some writers affirm that the source of property rights are the laws of nature and of nature's God. Others have written that all property is a product of civil power. While the debate has never been settled in the numerous volumes of literature, the Declaration of Independence settled the matter for the United States. The Declaration of Independence affirms unalienable rights derived from the laws of nature and of nature's God. Support for this position is found in the writings of American legal scholars Henry St. George Tucker, James Wilson and James Kent.

1. Henry St. George Tucker

St. George Tucker's edition of Blackstone's *Commentaries* contains numerous references to the Constitution of the United States and appendices addressing the laws of Virginia and the federal union. His notes indicate his position concerning property rights.

Blackstone's text contains several comments concerning the right of inheritance. Within this context, Blackstone asserted that inheritance was a political establishment. Blackstone felt this to be the case because "the permanent right of property . . . was no natural, but merely a *civil*, right."[91] Tucker noted, "l cannot agree with the learned commentator, that the permanent right of property vested in the ancestor himself, (that is, for his life) is not a natural, but merely a civil right."[92] Tucker's position was clearly distinctive: "[T]he notion of property is universal, and is suggested to the mind of man by reason and nature, prior to all positive institutions and civilized refinements."[93] He recognized that "[i]f the laws of the land were suspended, we should be under the same moral and natural obligation to refrain from invading each other's property, as from attacking and assaulting each other's person."[94]

Tucker's reasoning was consistent with the laws of nature and of nature's God. Even if civil laws are repealed, the laws of nature and of nature's God are eternally binding. This is so whether or not man chooses to recognize the fact. Therefore, Tucker rejected any notion that property rights were contingent upon society and civil laws. He recognized the inherent aspect of property rights.

2. James Wilson

James Wilson was appointed to the United States Supreme Court in 1789. He participated in the drafting of both the Declaration of Independence and the Constitution of the United States. His knowledge of American liberties was summarized in a collection of his lectures.[95] Wilson devoted one lecture to the history of property. He noted that "[t]he general property of man in animals, in the soil, and in the productions of the soil, is the immediate gift of the bountiful Creator of all."[96]

From the premise that all property was a gift from God, Wilson argued that common ownership of property was contrary to the laws of nature. He used the evidence of the history of Virginia to note that the colonists made the mistake of forbidding and preventing private property. Because goods were kept in common, many people refrained from work because they knew that the rest of the public would be obligated to provide for them.[97]

The extent of injury fostered by common ownership was evidenced by the colony of New Plymouth. They also initiated common ownership of property, but it led to the near starvation of all inhabitants. The recognition of private property was allowed as a last resort. Soon, the initiative and pursuits

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91. 2 W. Blackstone, Commentaries *11.

92. 3 Blackstone's Commentaries 11 n.* (St. George Tucker ed. Philadelphia 1803 & photo. reprint 1969).

93. *Id.*

94. *Id.*

95. The Works of the Honourable James Wilson (B. Wilson ed. Philadelphia 1804).

96. 3 *id.* at 182.

97. *Id.* at 193-94.

of the inhabitants fostered development enough to avoid starvation and deprivation.[98]

Wilson affirmed that the right of property was inherent in the nature of men. He argued that such exclusive property fosters industry and multiplies products. "[T]he means of subsistence are secured and preserved, as well as multiplied . . . . Exclusive property prevents disorder, and promotes peace."[99]

Wilson refused to accept the argument that property was merely a civil privilege. He recognized that property rights are inherent within man and dictated by the laws of nature and of nature's God. This position surely influenced his work on the Declaration of Independence, the Constitution of the United States, and the Supreme Court of the United States.

3. James Kent

James Kent addressed property by first rejecting any notion of man in a state of nature. "To suppose a state of man prior to the existence of any notions of separate property, when all things were common, and when men throughout the world lived without law or government, in innocence and simplicity, is a mere dream of the imagination."[100] Kent affirmed that the history and nature of man cannot be known apart from the book of Genesis. From that source it was clear to him that a "sense of property is inherent in the human breast . . . . Man was fitted and intended by the author of his being for society and government, and for the acquisition and enjoyment of property. It is, to speak correctly, the law of his nature . . ."[101]

Kent affirmed dependence upon the laws of nature and of nature's God. Property rights existed prior to social laws or institutions of property. Kent affirmed dependence upon the law of nature and claimed that the first title to property was acquired by occupancy. "The right of property, founded on occupancy, is suggested to the human mind by feeling and reason prior to the influence of positive institutions."[102]

Kent also illustrated his concern over civil encroachment. He pointed out that in the United States

> the right to acquire, to hold, to enjoy, to alien, to devise, and to transmit property by inheritance, to one's descendants, in regular order and succession, is enjoyed in the fulness and perfection of the absolute right. Every individual has as much freedom in the acquisition, use, and disposition of his property, as is consistent with good order and the

98. *Id.* at 194.

99. *Id.* at 194-95.

100. 2 J. Kent, Commentaries *317.

101. *Id.* at 318.

102. *Id.* at 319.

> reciprocal rights of others.[103]

Kent also affirmed that "the legislature has no right to limit the extent of the acquisition of property, as was suggested by. . . some modern utopian speculations."[104] He concluded:

> A state of equality as to property is impossible to be maintained, for it is against the laws of our nature . . . . [T]he operation of the steady laws of nature will, of themselves, preserve a proper equilibrium, and dissipate the mounds of property as fast as they accumulate. Civil government is not entitled, in ordinary cases, and as a general rule, to regulate the use of property in the hands of the owners, by sumptuary laws, or any other visionary schemes of frugality and equality.[105]

According to Kent, the individual was created with the inherent right to acquire and use property consistently with the laws of nature and of nature's God. As a result, property does not originate with civil society. Civil society exists in order to help secure the rights of the individual. The civil ruler does not have ultimate title to the property of the individual and may not regulate it contrary to the laws of nature and of nature's God.

The writings of the American scholars Tucker, Wilson and Kent articulated the position of the Declaration of Independence, namely, that the laws of nature and of nature's God mandate unalienable property rights. European scholars, however, did not support this position. Nevertheless, the writings of Europeans such as Locke and Blackstone have been most influential. Their theories were foundational for the conclusions reached by Joseph Story.

4. John Locke

Chapter five of Locke's second treatise was devoted to an examination of that "private Dominion, exclusive of the rest of Mankind."[106] Locke based the justification for individual ownership of a thing in that person's expenditure of labor to extract it from the state of nature. Labor was the key because it is the investment of a part of himself.[107]

Locke attempted to base his argument in Holy Scripture. He asserted that it is "very clear, that God *. . . has given the Earth to the Children of Men.*"[108] This foundation is a valid statement from

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103. *Id.* at 327-38.

104. *Id.* at 328.

105. *Id.* at 328-29.

106. J. Locke, *supra* note 30, at 328.

107. *Id.* at 328-30.

108. *Id.* at 327 (quoting Psalm 115:16).

Scripture. Locke concluded that God gave the earth "to Mankind in common."[109] Locke gave no justification from the cited Scripture for this social compact.

Rather than defend his presupposition of common ownership, Locke moved into his classic labor theory of private property. His main premise was, "Though the Earth, and all inferior Creatures be common to all Men, yet every man has a *Property* in his own *Person*. This no Body has any Right to but himself. The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his."[110] From this assertion, Locke claimed that "[w]hatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property*."[111]

5. Sir William Blackstone

The influential Blackstone said that the right of private property "consists in the free use, enjoyment, and disposal of all [personal] acquisitions."[112] While he spoke of the "sacred and inviolable rights of private property,"[113] he equivocated concerning the origin and nature of property right. He indicated that the "original of private property is *probably* founded in nature," but that much of this natural liberty was sacrificed in order to enjoy society's protection of it.[114] Apparently he was uncertain whether to adopt a law of nature position or a social compact theory.

Blackstone turned to the revealed law of God for "the only true and solid foundation of man's dominion over external things."[115] He referred to Genesis chapter one wherein the Creator gave man "dominion over all the earth."[116] From this, he concluded that it speaks of "the general property of all mankind."[117] Blackstone considered this common ownership sufficient for only a short time as the growth of population led to conflicts over the subject of dominion. He adopted a social compact theory, asserting that "[n]ecessity begat property,"[118] meaning that civil laws recognizing the institution of property were needed for the beneficial resolution of conflicts. He modified his social compact theory by holding that "bodily labour, bestowed upon any subject which before lay in

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109. *Id.*

110. *Id.* at 328-29. 111 *Id.* at 329.

111. *Id.* at 329.

112. 1 W. Blackstone, Commentaries *138.

113. *Id.* at 140.

114. *Id.* at 138 (emphasis added).

115. 2 *id.* at 3.

116. *Genesis* 1:28.

117. 2 W. Blackstone, Commentaries *3.

118. *Id.* at 8.

common to all men, is universally allowed to give the fairest and most reasonable title to an exclusive property therein."[119] This position was similar to Locke's stance, indicating that property was merely a civil right and not an inherent right of man.[120]

6. Joseph Story

In an article entitled *Natural Law*, Story addressed the origin of property.[121] He asserted that all people have an equal right to the use of those things which are common and universal. Property, however, consists of an exclusive right to the possession, use and enjoyment of a thing.

Story gave a mostly descriptive statement of the historical arguments concerning property. He briefly asserted that in the mere state of nature, all things were held in common. He then indicated that the theory of possession and use could justify only a temporary claim of ownership. Similarly, he noted the labor theory was inadequate because it would erroneously allow extreme inconvenience and injuries to the common claims of others. Such should not be allowed regardless of the amount of labor spent.

Story discredited the social contract as mere unsupported theory. The claim of right by occupancy was discounted as at best temporary. Even the notion that all men were created equal and should therefore be free to appropriate whatever each one needs was inadequate because it threatened to deplete the supply needed by others. It appears that, according to Story, all theoretical justifications for property are unfounded.

Into the theoretical void, Story was able to assert his theory.

> The truth, however, seems to be, that, in a state of nature, each man actually appropriates to himself whatever he desires, and can get; and he then holds it by the title of the strongest; and no other person respects his title any longer than it can be so maintained . . . .[122]

To Story, the "first rudiments of exclusive property begin in the fact of actual possession and power."[123] Story's main premise was power. The proper authority to an item may be irrelevant so long as one has enough power. From this position, he argued that "whatever may be the origin of the right of property, it is very certain, that, as it is now recognized and enforced, it is a creature of civil government."[124] It was no longer relevant to discuss various theories of the origin of property

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119. *Id.* at 5.

120. *Id.* at 11.

121. J. Story, *supra* note 60, at 155-56.

122. *Id.* at 155.

123. *Id.*

124. *Id.* at 155-56.

right because it was "the result of the positive institutions of society."[125] Only civil society has enough power to insure the most beneficial use.

Story's position was merely the logical result of the common ownership notion espoused by Locke and Blackstone. While Locke and Blackstone built their labor and social compact theories upon common ownership, Story implied that these were erroneous deviations. Common ownership must be the foundation, with the only right to any property dependent upon one's power. Common ownership may be maintained by a civil order with enough power to possess all property.

The nineteenth-century debate concerning the nature of property rights was unnecessary. The Declaration of Independence settled the issue. The writings of the American legal scholars Tucker, Wilson and Kent affirmed the principles articulated in the Declaration of Independence. This position and the scholars in support of it have been rejected in favor of the theories of the European writers Locke and Blackstone, and the further conclusions of Story. The position of Tucker,Wilson and Kent, premised upon the laws of nature and of nature's God, has not been refuted, but merely ignored. The European theories have been adopted, completely ignoring America's break from England.

B. Functional Thinking and Legal Education

The debate concerning whether property was founded upon the laws of nature and of nature's God or upon civil power was never adequately resolved. Nevertheless, the theories of Locke, Blackstone and Story were more readily accepted. Without a fixed position, academics began to justify American property law as the outgrowth of expediency. Expediency could be justified historically by looking to the civil practice of feudalism. As the twentieth century approached, the quest for American feudalism was underway.

Jeremy Bentham, another European theorist, was a nineteenth-century utilitarian who advocated that the end and aim of all good government should be the greatest happiness of the greatest number. He also asserted that "[b]efore laws were made there was no property; take away laws, and property ceases."[126] His position was similar to the power argument of Joseph Story. This position means that property is defined by the laws society promulgates and can be manipulated for the good of society regardless of the effect on the individual. Attention focused upon the concentration of power into the hands of those who would oversee the efficient manipulation of property for the good of the whole.

Utilitarian notions led to new ideas concerning corporations and feudalism. The historical development of the private corporation was interpreted as merely the result of efficient manipulation of property. This new perspective concerning the corporation and its structure became a means to

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125. *Id.* at 156.

126. J. Bentham, Theory of Legislation 69 (Oceana Pub. Inc. ed. 1975).

evidence the beginning of a new feudalism. Academics argued that the Founding Fathers did not foresee the threat of the corporation because they assumed that "a revival in any form of the features of the feudalism of the past was impossible."[127] Nevertheless, according to the academics, the corporation and "legal ingenuity, would in time bring forth and re-establish the substance of those oppressions from which their English ancestors had so hardly and so recently escaped."[128] The corporation was explained to be a device for efficiently exercising power over men and property in a manner consistent with its feudal origins. This was justified by explaining that corporate authority must be derived from the state, which has replaced the feudal king. Consequently, the corporation and all who worked therein were under the ultimate control of the state.

Within a few years of the assertion of corporation feudalism, Roscoe Pound expressed his ideas about how law could be used to foster control and efficiency. He built upon the ideas of utilitarian efficiency through social regulation. He also sought to foster the greatest good of the greatest number. He wanted to accomplish the "recognizing and satisfying of human wants or claims or desires through social control."[129] Pound recommended that the law be used as a tool of social control and power. Pound hoped to see "a more embracing and more effective securing of social interests; a continually more complete and effective elimination of waste and precluding of friction in human enjoyment of the goods of existence - in short, a continually more efficacious social engineering."[130]

Pound advocated his theory of social engineering and offered a new theory of property consistent with his doctrine. He noted that "the law of property is a wise bit of social engineering."[131] The implicit notion of Pound's statement was that because a law concerning property existed, the process of social engineering was already underway. He felt that the process should be increased in order to satisfy more human wants. The most efficient control and satisfaction of needs would become possible "without holding that private property is eternally and absolutely necessary."[132]

Pound did not believe that property rights were unalienable. Rather, he believed that property rights were merely a tool of society that could be used as a means to control and satisfy needs. He rejected any notion of eternal or absolute concepts of property. As a result, the only property rights were those granted by the social engineer, administrative agency or state.

The early rejection of the laws of nature and of nature's God necessitated the search for a complete theory of property. Unalienable rights were rejected in favor of civil rights and social control. The

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127. Richmond, *The New Feudalism,* 6 Am. Law. 413, 413 (1898).

128. *Id.*

129. R. Pound, An Introduction to the Philosophy of Law 47 (rev. ed. 1954).

130. *Id.*

131. *Id.* at 132.

132. *Id.*

power argument of Story was to become undeniable. The utilitarian ideas of Bentham were to influence the exercise of power in a direction toward efficiency for the greatest good. Pound's social engineers would oversee the whole procession toward a new society.

The idea of the corporation as a new feudal lord was compatible with Pound's desire for social control. The new feudalism evidenced the efficiency of control and the satisfaction of many needs. The recognition of the new feudalism fostered the quest for the American feudalism to give greater historical justification. One academic article referred to "The Quest for Tenure in the United States."[133] The article indicated that none of the "familiar" signs of English tenure were evident in the United States. Even though the signs were not apparent, the assertion was that American law, particularly property law, was built upon a foundation of feudalism.

The result of the academic search for American feudalism is that American casebooks are built around a discussion of feudalism. The casebooks repeatedly rely upon quotes from Jeremy Bentham and Roscoe Pound to support notions of civil control. The modern casebooks on property have limited the introductory information to discussion of the theorists that advocate the power and utilitarian social engineering arguments. There is no discussion of unalienable rights. The emphasis is upon convincing the student that power, utilitarianism, social control and feudalism have been long established as the key principles of property. The premise is that the history of feudalism justifies the idea of property as the creature of society that must be socially controlled for efficiency.

A casebook by Cribbet and Johnson is commonly used for discussing property based upon feudalism, beginning with a discussion of "Property as an Institution."[134] "[W]e have an 'institution' whenever we discover a cluster of social usages from which an individual may depart only at his peril."[135] The foundation is established that property is merely a creature of society and is naturally subject to civil control.

The authors then present an excerpt from Jeremy Bentham: "Before laws were made there was no property . . . "[136] Bentham's comment is supported in the text by the statement that "[p]roperty rights are an instrument of society."[137] This is revealing if one realizes that an instrument is "a device functioning as part of a control system.[138] Apparently, any right of property is allowed merely as an expedient measure functioning to attain a greater good for the whole as determined by the controlling civil power.

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133. Vance, *The Quest for Tenure in the United States*, 33 Yale L.J. 248 (1924).

134. J. Cribbet & C. Johnson, Cases and Materials on Property 1 (5th ed. 1984).

135. *Id.* at n.* (quoting 1 Powell on Real Property 7 (1976)).

136. *Id.* at 4 (quoting J. Bentham, Theory of Legislation 113 (Dumont ed. 1864)).

137. *Id.* at 11 (quoting Demsetz, *Toward a Theory of Property Rights*, 57 Am. Econ. Rev. Papers & Proceedings 347 (1967)).

138. The American Heritage Dictionary of the English Language 666 (2d college ed. 1985).

The idea that property functions within a control system is supported by an excerpt from an article by Roscoe Pound: "[T]here are no such things as rights. There are only social functions . . . . '[P]roperty is not a right; it is a social function. The owner . . . by the fact of his possession, has a social function to perform.'"[139] Pound is quoted to indicate that if the individual does not perform his social function with his property, "the state is to intervene and compel him to employ it 'according to its nature.'"[140]

The presupposition of the Cribbet and Johnson text is that it is irrelevant to speak of unalienable rights because there are no rights. The authors do not present any arguments in favor of unalienable rights or even refer to the nineteenth-century debate. The individual has no other function than to carry out the social mandate concerning the function of property. The individual is merely a worker for the state. All claims of individual ownership rights are invalid because the state asserts ultimate control, or eminent domain.

The position that society dictates the use of all property within its jurisdiction lays the foundation for a discussion of European feudalism as the root of the Anglo-American law of estates in land. The effect is to justify civil domination by a reference to the historical practice of feudalism wherein the king was the only true owner and controller of property.

The Cribbet and Johnson presentation of historical feudalism does not indicate that the colonists rejected the principles of feudalism. The authors justify civil control over property by citing the Nebraska Supreme Court case *In re O'Connor's Estate*.[141] The Court stated that "first and originally the state was the proprietor of all real property."[142] This premise is not substantiated but is the foundation for declaring that

> ownership is in fact but tenancy . . . . When this tenancy expires or is exhausted by reason of the failure of the state or the law to recognize any person or persons in whom such tenancy can be continued, then the real estate reverts to and falls back upon its original and ultimate proprietor, or, in other words, escheats to the state.[143]

The Cribbet and Johnson text gives the impression that state lawmakers have the discretion whether to recognize the right of an individual to property. If this is indeed so, no person is secure in his unalienable property right. By this, any title to property becomes merely a privilege granted by virtue of the state's temporary willingness to look favorably upon an individual, while it remains as

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139. J. Cribbet & C. Johnson, *supra* note 134, at 12-13 (quoting Pound, The Law of Property and Recent Juristic Thought, 25 A.B.A.J. 993, 996 (1939)).

140. *Id.* at 13.

141. *Id.* at 240-41 (quoting 126 Neb. 182, 252 N.W. 826 (1934)).

142. *Id.* at 240.

143. *Id.*

easily and arbitrarily revocable. The text seems to indicate that civil government always retains ownership while merely allowing an individual to use the property.

When this case is related to *Flynn v. City of Cambridge,*[144] which appears later in the Cribbet and Johnson text, an interesting theme arises. The case focused upon a dispute over a city ordinance which prohibited the removal from the market of any controlled rental unit unless the city rent control board issued a permit. Under previous law, the owners had the right to occupy the unit. The law changed, denying them the right to move into the property which they owned but were previously renting to others. "[T]he governmental action did not interfere with the owner's primary expectation concerning the use of the property, and the owner was still able to obtain a reasonable return on its [sic] investment."[145] As well, "they were not denied a right to which they had a legitimate expectation. Clearly the government is not required to compensate an individual for denying him the right to use that which he has never owned."[146] The implication is that while an individual may think he owns a piece of property, his assumption is erroneous. The state is the owner. The individual may reasonably expect only whatever benefit the government allows. His only legitimate expectation is to be able to use the property as the state allows.

The state is asserted to be the ultimate proprietor of all real property. The individual interest is held by what is no more than a license. A license rests entirely upon the owner's permission. It is revocable at the will of the licensor. A license is not considered a property interest under the requirement that compensation be given for property taken by right of eminent domain.[147]

Examination of a second casebook, *Basic Property Law* by Browder, Cunningham and Smith,[148] indicates that the above view of property is not uncommon. Jeremy Bentham is again relied upon to define property as "a legally protected 'expectation.'"[149] The text notes Bentham's claim that " a strong and permanent expectation" of receiving an advantage "can result only from law."[150] Of course, the law is a result of civil power.

The reliance upon Bentham is consistent with the utilitarian notion that the law should promote the efficient and maximum fulfillment of human needs and aspirations. The concern then becomes how to efficiently meet legitimate expectations. Browder, Cunningham and Smith rely upon Posner for the notion that

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144. *Id.* at 551-56 (quoting 383 Mass. 152, 418 N.E.2d 335 (1981)).

145. *Id.* at 555.

146. *Id.*

147. F. Philbrick, Property 328 (5 The National Law Library, R. Pound ed. 1939).

148. O. Browder, Jr., R. Cunningham & A. Smith, Basic Property Law (4th ed. 1984).

149. *Id.* at 2.

150. *Id.* (quoting J. Bentham, Theory of Legislation 69 (Oceana Pub. Inc. ed. 1975)).

> "the legal protection of property rights has an important economic function: to create incentives to use resources efficiently," and that there are three criteria of an efficient system of property rights:
>
> 1. Universality - i.e., "all resources should be owned or ownable by someone . . . ."
>
> 2. Exclusivity - to give owners an incentive to incur the costs required to make efficient use of resources owned by them.
>
> 3. Transferability - because, "[i]f a property right cannot be transferred, there is no way of shifting a resource from a less productive to a more productive use through voluntary exchange."[151]

Posner's three criteria justify complete state control of property. This is necessary in order to obtain top efficiency and to insure that all resources are owned by someone. This efficient system fosters the individual's perception of exclusive ownership and thereby encourages him to incur the maintenance expenses. State expenditures are thereby reduced. It is questionable, however, whether Posner's efficient system truly has room for "voluntary" transfers of property. The fullness of state power and the use of coercive tactics serve to give an appearance of voluntariness to a compelled submission to civil control.

Posner's outline is the logical groundwork for the Browder, Cunningham and Smith presentation of the history of feudalism. The feudal property system allegedly developed because it worked to efficiently meet the needs of the established regime. The assertion is made that many of the benefits of the feudal system are the same as those we currently associate with ownership.[152] This is an apparent endorsement of feudalism as an acceptable institution for use in the United States in order to foster greater control and more efficient redistribution of resources.

The two casebooks examined are not peculiar in their endorsement of feudalism and civil power. Though they are the most commonly used casebooks, all property casebooks are written from a similar perspective. Property casebooks can be divided into two basic categories: those which are primarily descriptive of the current state of the law, and those which examine the theory of property.[153] The two books relied on for this examination are primarily theoretical. Regardless of

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151. *Id.* at 4 (quoting R. Posner, Economic Analysis of Law 10-13 (1972)).

152. *Id.* at 220. The textual discussion of feudalism beginning on page 220 is considered central, and the feudal theme continues through the remaining portion of the text.

153. Descriptive texts: J. Bruce, J. Ely, Jr. & C. Bostic, Cases and Materials on Modern Property Law (1984); C. Donahue, Jr., T. Kauper & P. Martin, Cases and Materials on Property: An Introduction to the Concept and the Institution (2d ed.1983); E. Rabin, Fundamentals of Modern Real Property Law (2d ed. 1982); P. Goldstein, Real Property (1984); A. Casner & W. Leach, Cases and Text on Property(3d ed. 1984); J. Dukeminier & J. Krier, Property (1981); C. Haar & L. Liebman, Property and Law (2d ed.1985). Theoretical texts: O. Browder, Jr., R. Cunningham & A. Smith, Basic Property Law (4th ed. 1984); J. Cribbett & C. Johnson, Cases and Materials on Property (5th ed. 1984);

the category, however, all the books rely upon a lengthy discussion of feudalism to explain modern practices of property law. As a result, extensive regulation to the point of complete government control is justified.

In summary, the information in the typical casebook asserts that property is merely a function of society and therefore subject to state control. There is no discussion of the nineteenth-century debate over the degree of civil regulation and unalienable rights. The concept of unalienable rights is not even acknowledged. The history of feudalism is assumed applicable to the United States. There is no presentation of evidence showing the American rejection of feudal principles. The casebooks assert that any interest which a person holds in any property is merely by virtue of the laws of society recognizing the right of the individual to hold such property, at least so long as it is expedient for the achievement of a justifiable social function. As in the feudal system, the individual is able to hold only as a tenant but never as full owner. The ultimate proprietor is the state. As a result, a new generation of lawyers is equipped to facilitate further government control over property. Unalienable property rights are increasingly threatened for the benefit of society.

The lengthy discussion of various theories of property is important because ideas have consequences. This impact is increased if ideas are more widespread. The use of property law casebooks served to popularize the justification of civil power over property. These ideas manifested consequences in the form of progressive ideas in the political arena.

C. From Theory to Political and Legal Effects

The third stage was the political enactment of the theoretical concepts. The Progressive Movement in American history advocated centralization of civil power. Such a strong government would extend control over industry, finance, transportation, agriculture, labor, education and morality. The new social and political platforms justified public control of social and economic institutions as the essence of liberal democracy.[154]

The idea of inevitable social progress gained power in the latter nineteenth century. The idea of continual progress received intellectual support from Darwin and the idea of evolution, and the concept of the survival of the fittest appeared to make progress inevitable.[155]

The evolutionary idea of progress undercut the foundations of individual liberty and limited government. Natural law and natural rights theories were abandoned. Refusing to attribute their rights to the laws of nature and of nature's God, people turned to civil government as the giver of

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C. Berger, Land Ownership and Use (3d ed. 1983); S. Kurtz & H. Hovenkamp, Cases and Materials on American Property Law (1987).

154. 2 S. Morison & H. Commager, The Growth of the American Republic 356 (4th ed. 1950).

155. 4 C. Carson, A Basic History of the United States 2-3 (1985).

rights.[156]

The Progressives used democracy to advance their evolutionary socialism. The reformers espoused democracy in an attempt to expand the popular control of civil power, linking this to progress and Progressivism. Democracy was identified with equality and the use of governmental power to make men more equal.[157]

The social gospel movement supported the social reform ideas of the Progressives.

> The social gospel movement was an effort to utilize Christianity for transforming the social order. Social gospellers had generally imbibed considerable doses of socialism, Marxism (usually second hand), utopianism and were often influenced . . . by such Americans as Henry George and Edward Bellamy . . . . Social gospellers were often most vociferous in their condemnation of the American economic system: private property, the profit motive, corporations, and competition.[158]

Proponents of the social gospel pushed for government intervention in the economy. Washington Gladden advocated, "It may become the duty of the state to reform its taxation, so that its burdens shall rest less heavily upon the lower classes; . . . to limit the ownership of land; to modify the laws of inheritance; and possibly to levy a progressive income tax."[159] George D. Herron claimed, "It is the vocation of the states . . . to so control property, so administer the production and distribution of economic goods, as to give to every man the fruit of his labor, and protect the laborer from the irresponsible tyranny of the passion of wealth."[160]

Some Americans were planning to gradually socialize the country before World War 1. Among the most influential were Herbert Croly, Walter Weyl and Walter Lippman. Croly's book of 1909, *The Promise of American Life*, served to influence Theodore Roosevelt's New Nationalism of 1912.[161]

A progression toward socialism within the American context was proposed. Rather than openly support socialism, such terms as nationalism, social democracy and democracy were used. The claim was that civil government should exercise control over every aspect of the economy for the public interest.[162] Lippman encouraged the gradual transformation of America toward a day when

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156. *Id.* at 3.

157. *Id.* at 117.

158. *Id.* at 122-23.

159. *Id.* at 123 (quoting W. Gladden, Applied Christianity 69-70 (1886)).

160. *Id.* at 124.

161. *Id.* at 126.

162. *Id.* at 127.

"[p]rivate property will melt away; its function will be taken over."[163]

The power of the federal government was to be increased so that the chief executive would control the public welfare. Teddy Roosevelt declared that those concerned with property and profits "must now give way to the advocate of human welfare, who rightly maintains that every man holds his property subject to the general right of the community to regulate its use to whatever degree the public welfare may require it."[164]

World War I revealed the effectiveness of a socialized economy. Industry, transportation and finance were integrated and controlled by the federal government. After the war, the issue was whether civil government should continue control over production and distribution. Years later, the great Depression fostered arguments for more centralization.

During his 1932 campaign for the Presidency, Hoover set forth his conception of the people's choice:

> It is a contest of two philosophies of government . . . . Our opponents . . . are proposing changes and so-called new deals which would destroy the very foundations of our American system . . . . You cannot extend the mastery of government over the daily life of a people without somewhere making it master of the people's souls and thoughts.[165]

Despite Hoover's efforts, Franklin Delano Roosevelt came into power. His New Deal extension of governmental control over the economy was consistent with the Progressive tradition. The New Deal fostered the redistribution of wealth. It inaugurated control over labor and farming.[166]

The New Deal brought the Agricultural Adjustment Act (AAA) of 1932 to establish equality between agriculture and industry by controlling commodity prices and easing farm credit and mortgages. The Secretary of Agriculture offered farmers government subsidies in return for reduced production.[167]

The AAA presupposed a planned economy. The plan required a reduction of both farm crops and the number of farmers. The agenda proposed the removal of millions of acres of land from cultivation and the resettlement of farmers in small semi-industrial communities. Mortgage debts were cancelled for some of those who were allowed to continue farming.[168] Civil power premised upon the state as preeminent leads to the displacement of persons who are considered no longer

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163. *Id.* at 128 (quoting W. Lippman, Drift and Mastery 147 (1961)).

164. T. Roosevelt, The New Nationalism 33-34 (W. Leuchtenburg ed. 1961 & reprint 1971) (speech on Aug. 31, 1910).

165. 2 S. Morison & H. Commager, *supra* note 154, at 582.

166. *Id.* at 586.

167. *Id.* at 591.

168. *Id.* at 593.

necessary and to the reduction of people authorized to pursue a profession. The pursuit of happiness is alienated. People and professions are expendable.

The Supreme Court recognized constitutional grounds to overturn some of the New Deal legislation. The Court said the AAA exercised coercion by economic pressure. Upholding the Act would have "the United States converted into a central government exercising uncontrolled police power in every state of the Union, superseding all local control or regulation of the affairs or concerns of the states."[169]

Prior to F.D.R.'s packing of the Court, New Deal legislation was overruled as an improper use of the Commerce Clause. After the Court reform, much less was needed to affect commerce and thereby justify regulation. The case of *Wickard v. Filburn*[170] serves to illustrate the extension of power.

Filburn owned a small wheat farm. Pursuant to the Agricultural Adjustment Act of 1938, Filburn was allotted 11.1 acres for a normal yield of 20.1 bushels of wheat per acre. He cultivated 23 acres, however, and harvested the excess for his personal consumption. Consequently, he was fined for the violation.

Filburn was cited for violating the scheme of the AAA The Act was to control the volume of wheat in commerce in order to avoid surpluses and shortages and the consequent price changes and obstructions to commerce. The Secretary of Agriculture directed the annual national acreage allotment, which was then apportioned to the states and their counties, and then allotted to individual farms.

The federal regulation extended even to the production not intended for commerce but intended for private consumption. The federal quota applied to the amount to be harvested for sale and for private consumption. Wheat produced in excess could neither be disposed of nor used except upon payment of a penalty.

The effect of the statute was to limit the use of individual property for personal purposes and needs. "That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial."[171] This argument justified the civil government usurpation of an individual's right to use his property in a manner consistent with the laws of nature and of nature's God.

The case of *Wickard v. Filburn* evidences the expansion of governmental power premised upon

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169. United States v. Butler, 297 U.S. 1, 77 (1936).

170. 317 U.S. 111 (1942).

171. *Id.* at 127-128.

feudal notions. The continuation of this philosophy has led to the redefinition of property and a new feudalism. The new property is premised upon the growth of governmental power. Such expansion has led to welfare, occupational licensing, monopolies and zoning. This expansion of power increases the similarity to the feudalistic state wherein all power and ownership were in the king, while the people were wholly dependent upon the king's benevolence.[172] Unalienable rights are violated. Independence is eroded for the sake of the creation of a new society wherein all power rests with the legislature and the courts. The new property bestowed by the benevolent state is merely held by the recipient on a conditional basis. It is always subject to confiscation in the interest of the paramount state.

While such a decision as *Wickard v. Filburn* should not have been surprising when handed down, such a decision should be equally expected today. The underlying philosophy of the modern Court is not distinguishable from the Court of the late 1930's. More evidence is found in the case of *Hawaii Housing Authority v. Midkiff.*[173]

The Hawaii legislature sought to compel large landowners to break up their estates. Upon application by lessees on the land, the property would be condemned and sold by the state. The Court upheld the legislation by finding that the action was rationally related to a purpose within the authority of the legislature. The purpose of the act was to address problems of a malfunctioning land market wherein willing buyers could not purchase at a fair price. The modern feudal kings control property, the market and prices.

These cases illustrate the increasing assault upon unalienable property rights. All this has stemmed from a rejection of the laws of nature and of nature's God as the foundation for law. Instead, theories of social control and power have been adopted. The failure to adequately resolve the nineteenth-century debate has led to the acceptance of increased civil control. The failure to recognize that Americans rejected feudalism while retaining some of the language has led to the claim that American property law is patterned after feudal principles and practices. The casebooks advocate this position without question. Consequently, the justification of civil power fostered drastic ramifications politically and legally. Some modern scholarship attempts to address the expansion and abuse of power that threatens property rights.

IV. THE CHALLENGE TO SECURE THE UNALIENABLE RIGHT OF PROPERTY

Beginning in the late 1970's and developing through the 1980's, new scholarship has arisen placing its emphasis upon a reevaluation of property rights. This new scholarship is the product of such sources including the Chicago School, Richard Epstein and Ellen Frankel Paul. The concern focuses on the extent of government power and on efforts to restore property rights by reexamining the various property theories. Nevertheless, these efforts still reject the foundation of the laws of nature

172. *See generally* Reich, *The New Property*, 73 Yale L.J. 733 (1964).

173. 467 U.S. 229 (1984).

and of nature's God. As a result, these scholars offer little to secure unalienable property rights. This presents the challenge to return to the true foundations expressed in the Declaration of Independence.

A. The Error of Contemporary Scholarship

The earliest phase of contemporary scholarship was spearheaded by the "Chicago School." The political science of the Chicago School was a direct outgrowth of the Progressive era. Progressive reform was modified by use of scientific empirical inquiry. The rights of man were to be premised upon a rejection of traditional moral principles in favor of a scientific approach to reform. The facts revealed the right. Facts were interpreted in light of power. A particular balance of power between the state and the individual must be attained in the process of social control and redistribution of property.[174] The Chicago School attempt at reform was in error because it rejected the laws of nature and of nature's God. Scientific theory still leads to increased civil power and the usurpation of unalienable rights if not interpreted in light of the laws of nature and of nature's God.

Besides the Chicago School, the primary alternatives consist of the occupation theory, the labor theory, the contract theory, the natural rights theory and the social utility theory. Modifications of these theories are frequently supported in casebooks. However, each one leads to the typical power position, which is then supported in the casebooks with a history of feudalism.

The occupation theory is also known as a theory of possession. The assertion is that the simple fact of occupation or possession justifies ownership. The main problem is that mere assertion of a right is not sufficient to create the right. Even if we admit the validity of the right, it would exist only temporarily so long as occupancy or possession was maintained.

The labor theory has already been addressed. The main claim is that a person has a moral right to ownership and control over the fruits of his labor. It is not logically sound to hold that mere expenditure of labor justifies exclusive ownership. Also, if no labor is expended in order to acquire a gift, it cannot be consistently maintained that the recipient of the gift is entitled to ownership.

The contract theory alleges that private property is the result of a contract between individuals and the community. This argument assumes that there was no possible property right prior to the establishment of civil society. This theory is unsupported by fact.

The natural law/natural rights argument is deceptively similar to the laws of nature and of nature's God position. However, the natural rights theory relies solely upon man's ability to reason without the aid of Scripture to determine whether the theory is consistent with fixed, uniform and universal truth. To refute this theory, it is enough to point out that reason and experience alone are not always consistent with truth.

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174. W. Bluhm, Theories of the Political System 222-47 (3d ed. 1978).

The social utility theory argues that law should promote the maximum fulfillment of human needs and aspirations, and that legal protection of private property promotes such fulfillment. This is the position of Bentham and Posner. The facts and conditions of society may change, however, such that the most efficient way to promote human fulfillment is to have the civil power mandate total factual equality. No person would be secure in his right.

Richard Epstein is a contemporary scholar who has sought to secure property rights.[175] His foundational argument is a critique of John Locke. He asserts that the Lockean labor theory is problematic because it assumes that God gave the earth to mankind in common. "The proper position would have been reached if Locke had dispensed with the idea of divine justification for private property and had adopted the traditional common law view of the original position."[176] According to Epstein, Locke was not wrong because of his common ownership theory. Locke was wrong because he did not rely upon the theory of possession. But Locke was even more incorrect, according to Epstein, because he tried to find a divine justification. He was wrong for trying to rely upon the laws of nature and of nature's God.

Epstein's position reveals that contemporary scholars are not beginning with the right foundation. This should not be surprising in light of Epstein's statement that in the final analysis, no system of property rights may be ethically defensible.[177] Therefore, while it may not be absolutely correct, the labor theory is sufficient to protect private property. This theory, as already noted, is premised upon a power theory. Epstein's acceptance of the occupation or original position argument of common law is also a theory premised upon power.

Epstein's rejection of God as the source of property right has weakened his ability to analyze Locke's position. Epstein did not adequately address the notion of common ownership. Locke's position was inaccurate. God did not grant common ownership. He granted authority over portions of His Creation to individuals in the family context. All that anyone has is a gift from God and not a result of one's labor or first occupation or possession. As a result, no civil government has ultimate or superior title to the property that has been granted to a person.[178]

Ellen Frankel Paul is another modern scholar to address property rights.[179] Like Epstein, she seeks to rescue individual property rights from the expansion of eminent domain and police powers. She seeks to do so within the context of a more carefully defined natural rights theory. One reason for this beginning point is her assumption that the American system was built upon a natural law

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175. R. Epstein, Takings: Private Property and the Power of Eminent Domain (1985).

176. *Id.* at 11.

177. Epstein, *Possession as the Root of Title*, 13 Ga. L. Rev. 1221, 1240-41 (1979).

178. *See generally* H. Titus, The Dominion Mandate: The Family, Private Property and Inheritance (1985) (unpublished manuscript); U. Middleman, Pro-Existence (1974).

179. E. Paul, Property Rights and Eminent Domain (1987).

philosophy.[180] The fact is, however, the Founders did not rely upon reason alone but looked to the laws of nature and of nature's God. The Founders were not merely natural law philosophers.

A major problem with the new natural law argument is the assumption that all rights are derived from man's need to survive.[181] Her natural law argument also allows for the adoption of feudal principles such as eminent domain because they are implicit within natural law theories. There is no discussion of the rejection of feudalism. There is no discussion about rights being God-given. There is no recourse to the laws of nature and of nature's God rather than natural law. As a result, Paul is left with an argument premised upon power.

The contemporary scholars fail to secure the unalienable right to property; they simply modify the erroneous theories that are premised upon power. Despite their concern over the use of civil power, their only arguments are balance-of-power arguments. As the balance of power continues to shift away from the individual, there is an increasing loss of liberty.

The primary theories and the modifications of them do not secure the unalienable right of property. Any right to be enjoyed under these theories would be merely temporary, granted by an all powerful government. Nevertheless, reliance upon these theories remains prevalent. There is, however, no reliance upon the Declaration of Independence or the laws of nature and of nature's God. There is merely an assumption that civil governments inherently possess supreme power to control all property.

B. The Increase of Civil Tyranny

Contemporary scholarship, rather than returning to the laws of nature and of nature's God, has simply modified ideas that violate unalienable property rights. In the meantime, actions of civil government continue to threaten rather than secure unalienable property rights. The continuing threat to unalienable rights is evidenced by the continual transfer of property and rights to the civil powers for redistribution. The distinction between public and private is increasingly blurred. Numerous administrative agencies outside the constitutional framework are established to oversee the efficiency of the redistribution system. Dependence upon the state is increased by threatened revocation of benefits and privileges. The whole system is to secure the public interest," the interest of the state.[182]

Efforts to secure the public interest are carried out primarily by the claims of eminent domain and the exercise of police power. The previously noted works by Richard Epstein and Ellen Paul both address these issues in detail. It is sufficient for this work to point out that both are premised upon coercive power. Eminent domain assumes that the civil government has preeminent power over all

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180. *Id.* at 77.

181. *Id.* at 224-39.

182. *See generally* Reich, *supra* note 172.

property within its domain. The fifth amendment to the United States Constitution is considered the source of this power and obligates just compensation for a taking. The police power, on the other hand, is exercised in the name of the public interest and is not bound by a just compensation requirement. Contemporary scholars are properly concerned about this power. It is becoming the principal means for attacking property rights because it can be arbitrarily exercised and does not require just compensation.[183]

Within a system seeking to secure the public interest by use of power, the state is the ultimate owner and controller of all property. Even occupations and wages are subject to arbitrary regulation. People become mere civil servants as an essential aspect of the government controlled work force and economy. A few general examples will evidence the logical extension of civil tyranny once the unalienable right of property is no longer secure.

If a person has property, he may choose to contract some of it away. He may seek to exchange it with another person who has property in something else. The pursuit of happiness by free contractual exchange is only possible if both parties have property rights. Without property, there is no contract. If property rights exist merely by the grace of the state, the right of contract is equally dependent upon the state. The civil government becomes a party to every contract in order to insure good judgment and fair exchange. The right to contract is equally violated when the unalienable right of property is violated.

Religious liberty is also threatened by violations of unalienable property right. If property is a function of civil power, the civil ruler controls all property and may confiscate it or regulate it as deemed necessary. Church property may be confiscated or regulated to the extent that it is impractical to use it. Homes and land may be confiscated or regulated in order to prevent individuals from gathering for prayer meetings or Bible studies.

Perhaps the greatest attack on liberty related to property right is the violation of the unalienable right to life. It may be claimed that all property impacts commerce in some way and therefore is subject to regulation. The life of a person may arguably impact commerce. An elderly person may influence commerce by needing medical services, welfare or social security. If the impact becomes too great, it may be necessary to encourage euthanasia to eliminate the negative impact on commerce. Similarly, the unborn child impacts commerce, education, welfare and social security. If the burden becomes too great, enforced abortion may become necessary. Life is threatened by the violation of property rights.

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183. A complete examination of eminent domain is beyond the scope of this thesis and is therefore left to others. *See generally* Thompson, *The Unalienable Right of Property: Examining the Fourth and Fifth Amendments*, 8 J. Christian Jurisprudence 189 (1990). It is enough to say here that the modern concept of eminent domain was not embodied in the fifth amendment. The fifth amendment was adopted to invalidate the taking of private property from one person for the private use and enjoyment of another. Midkiff v. Tom, 702 F.2d 788 (1983), *rev'd* Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984). James Madison saw the amendment as extra protection from the legislature becoming an instrument of a majority of those without property to take from those with property. 5 The Writings of James Madison 29, 271-72 (G. Hunt ed. 1904).

As a result of the violation of the unalienable right of property implicit within the pursuit of happiness, all aspects of life are equally threatened. The all powerful state premised upon power, seeks to control every aspect of property. All of life becomes subject to state control. The result of denying the unalienable right to property is the complete subjection of the individual to increasing civil tyranny. We must return to the Declaration of Independence, the laws of nature and of nature s God, and unalienable rights.

C. Return to the Declaration of Independence

The Declaration of Independence expressed certain self-evident truths; namely, that all men are created equal; all men are endowed by their Creator with certain unalienable rights, some of which are life, liberty and the pursuit of happiness, including property; governments derive their just powers to secure unalienable rights by consent of the governed; the people retain the right to alter or abolish any form of government which becomes destructive of unalienable rights. The principles reveal a world view which fosters property rights.

Immediately apparent from the Declaration is a recognition of the laws of nature and of nature's God. This speaks of fixed, uniform and universal rules of action established by God. The laws of nature and of nature's God are the source of the unalienable rights of mankind. Civil governments are bound to secure those rights, including property.

The Declaration expresses the principles which are the norm for civil government in the United States. The struggle, historically, was to establish a form of government consistent with the norms. Herein lies the failure of the Articles of Confederation. In its place was established the Constitution of the United States, which expressly adopts the Declaration.

The Constitution reaffirmed the importance of the Declaration by article 1, section 2 which requires that representatives must have been "seven Years a Citizen of the United States."[184] It would not be possible for the House of Representatives to convene in 1789 if the Declaration was not the founding document of this nation and still binding. This same proposition is true for Senators required by article 1, section 3 to have been nine Years a Citizen of the United States."[185]

Article 11, section 1 requires the President to have been "fourteen Years a Resident within the United States."[186] This is a residency requirement referring to 1775. This date is prior to the Declaration, yet corresponds to the Articles of Association of 1774. This argument is used in Abraham Lincoln's Inaugural Address affirming that "[t]he Union is much older than the

184. U.S. Const. art. I, §2, cl. 2.

185. U.S. Const. art. I, §3, cl. 3.

186. U.S. Const. art. II, §1, cl. 5.

Constitution. It was formed, in fact, by the Articles of Association in 1774."[187]

Article VII reaffirms the binding nature of the Declaration. This recognizes that the unanimous consent of those in the convention was recorded in the year of "the Independence of the United States of America the Twelfth."[188] This reaffirms that the Constitution and the Declaration are inseparably linked.[189]

The Declaration was considered binding upon states newly admitted into the Union even prior to the ratification of the Constitution. This is evidenced by the Northwest Ordinance providing for the establishment of new states on equal footing with the original states."[190]

The concern over equal footing was premised upon the need for equal representation. As a result of the importance placed upon assuring that each state in the Union is treated fairly, all admission statutes have contained the words "equal footing" or, to the same effect, "same footing." In addition, another clause is used to indicate with whom equal footing was granted. The majority of admission statutes use the term "original states." The original states must refer to those thirteen states which were party to the Declaration of Independence.

By affirming "equal footing with the original states" in subsequent admission statutes, the Founders bound new states to the principles of the Declaration. The admission statutes of several states expressly provide that their respective state constitutions shall be republican and not repugnant to the principles of the Declaration of Independence." Accompanying this language is the statement that all admissions were "on equal footing with the original states in all respects whatever."[191]

The nation and the states are bound to uphold the Declaration. This necessarily requires securing the unalienable right of the "pursuit of Happiness," which includes property. The national and state governments were formed to secure this right. Any act repugnant to the Declaration of Independence is also repugnant to the Constitution and, therefore, void. If such unlawful acts are upheld by civil servants, it is a breach of the charter and by-laws of this nation. Such actions must be altered or abolished.

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187. A. Lincoln, First Inaugural Address (Mar. 4, 1861), *reprinted in* 7 Messages and Papers of the Presidents 3208 (J. Richardson ed. 1897).

188. U.S. Const. art. VII.

189. *See also* J.Q. Adams, The Jubilee of the Constitution, A Discourse Delivered at the Request of the New York Historical Society, on Tuesday, the 30th of April, 1839, *reprinted in* 6 J. Christian Jurisprudence 4 (1986).

190. Sources, *supra* note 14, at 395.

191. *See* Nebraska, ch. 59, 13 Stat. 47,48 (1864); Nevada, ch.36,13 Stat.30,31 (1864); Colorado, ch.37,13 Stat. 32,33 (1864); N. Dakota, S. Dakota, Montana, Washington, ch. 180, 25 Stat. 676, 677 (1889); Utah, ch. 138, 28 Stat. 107, 108 (1894); New Mexico, ch. 310, 36 Stat. 557, 558 (1910); Arizona, ch. 310, 36 Stat. 557, 569 (1910).

V. CONCLUSION

This examination of the foundation of property law in the United States has not presented any new principle or new argument. The principle expressed is that the right of property is unalienable. This principle of unalienable property rights is as old as the laws of nature and of nature's God from which it is derived. That same principle is the very one to which the Declaration of Independence refers in the phrase the pursuit of Happiness." It is also the very foundation of property law in the United States.

The Declaration of Independence is a document premised upon the laws of nature and of nature s God. Only upon this foundation is it possible to secure unalienable rights. The unalienable right to the pursuit of happiness, which includes property rights, can only be secured by adherence to the foundation upon which all of American civil government was established. Regrettably, however, that foundation has been rejected.

The challenge that faces America is to return to the foundations upon which all rights are premised. The only way individuals can be free and unalienable rights secure is by the recognition that civil government is subject to the laws of nature and of nature's God. The dictates of the laws of nature and of nature s God are binding whether or not they are acknowledged or noted in the Declaration of Independence. But since we have such a document to remind us of our duty, we ought to accept the challenge and return to the principles of the Declaration. Only then will property rights be secure, all unalienable rights protected, and the individual truly free.

The challenge is to secure unalienable property rights by returning to the principles of the laws of nature and of nature's God. The challenge involves the elimination of civil domination by extensive regulation. The civil authority should be limited to providing remedies for wrongs inflicted rather than seeking to eliminate possible wrongs. This can be accomplished by the use of nuisance, trespass, theft and other such principles of law. These historically effective legal actions are consistent with a recognition of unalienable property rights. They allow an individual to use his property freely but provide remedies in case he oversteps his liberty and thereby wrongs someone.

For instance, a person should be able to build a skateboard ramp in his backyard without first acquiring a permit from the civil power. Sometimes a permit will be denied because of zoning ordinances which limit construction or property use. Once the ramp is built, if the noise generated by the use is too loud, it may be in violation of some zoning ordinances and subject to a fine. The proper solution would be for those neighbors who are suffering the nuisance, if indeed there is one, to bring a nuisance action against the owners of the ramp. A court action would then determine a solution such as discontinued use, payment of damages to the wronged individuals, or simply a relocation of the ramp. The point is, the individual should not be punished before he violates the laws of nature and of nature's God. As well, the person should not be so regulated that it is impossible for him to do wrong. He should, however, be held to answer for the wrongs actually committed against a person. This position is consistent with Blackstone's definition of the pursuit

of happiness[192] and Kent's comment concerning utopian equilibrium.[193]

Civil governments are instituted to secure the unalienable rights of the individual. Unalienable rights are secured by a civil government which provides civil remedies by recourse to courts. If one individual has his unalienable rights violated by an individual overstepping the limits of his rights, the wronged individual may pursue the civilly-provided process for remedy. This process is far superior to a utopian notion which seeks to eliminate all possible opportunity for the commission of a wrong. The laws of nature and of nature's God allow an individual the freedom to make a mistake but hold him accountable for the wrong committed.

There is a price to be paid to restore security to our threatened unalienable rights. Individuals will have to recognize the civil threats to their unalienable property rights. Steps must be taken to eliminate the increase in zoning ordinances. The trend favoring redistribution of wealth must be eradicated. Civil officials must be held accountable for fostering the increase in civil tyranny contrary to the Declaration of Independence and the Constitution.

The increasing violation of the unalienable right of property, and indeed all unalienable rights, is a central component of the increase of civil tyranny. The trend will not end overnight. But it certainly will not end unless efforts are made to return to the Declaration of Independence and the laws of nature and of nature's God. Civil powers must be exercised consistently with this foundation. Only then will there be a solid foundation for securing unalienable property rights.

192. *See supra* text accompanying notes 48-51.

193. *See supra* text accompanying note 100. *See also* U. Middleman, Pro-Existence (1974).